STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL NEIL FEALK a/k/a
DANIEL NEAL FEALK,

Defendant-Appellant.

UNPUBLISHED
May 23, 1997

No. 192667
Washtenaw Circuit Court
LC No. 94-002819 FH

Before: Wahls, P.J., and Hood and Jansen, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree retail fraud, MCL 750.356c; MSA 28.588(3). Defendant was sentenced as a second habitual offender to two years' probation. Defendant appeals as of right and we affirm.

Defendant first argues that the trial court erred in denying his motion for a new trial because the evidence was insufficient to support his conviction and the verdict was against the great weight of the evidence.

When determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). The elements of first-degree retail fraud are: (1) the defendant took some property that was offered for sale; (2) that the defendant moved the property; (3) that the defendant intended to steal the property; (4) that such actions happened inside the store or in the immediate area around the store while the store was open to the public; and (5) that the price of the property was over $100. CJI2d 23.13.

Defendant contends that there was no evidence that he intended to steal the videocassette recorder (VCR) from Meijer. In this case, defendant was carrying a VCR toward the front of the store

without having paid for it. He admitted that he passed the checkout lanes and was headed toward the exit door. Defendant, however, claimed that he did not intend to steal the VCR, but that he was going to show it to a friend who was using a pay phone.

Defendant cites *Freeman v Meijer, Inc*, 95 Mich App 475; 291 NW2d 87 (1980), in support of his argument that the intent element for first-degree retail fraud was not proved beyond a reasonable doubt. This Court stated in *Freeman, supra*, p 478-479, that "the mere taking up of goods in the sales area does not constitute asportation with felonious intent. . . . There must be some conduct by the customer which makes his possession clearly adverse to the store." Defendant argues that the prosecution failed to prove his intent to steal the VCR because he did not attempt to conceal it, had not left the store when he was stopped by security personnel, and made no attempt to escape when he was detained by security officers. However, there was undisputed evidence that defendant passed the entire row of checkout lanes, including a few which he admitted were open, and was heading toward the exit door when he was stopped by store security. Viewing this evidence in a light most favorable to the prosecution, it is sufficient for the jury to find that defendant moved the store property and to infer from the circumstances that defendant intended to steal the property.

Defendant's argument that the verdict was against the great weight of the evidence is based on witnesses' biases and insufficient proof of the intent element. The sufficiency of the evidence was satisfied, as addressed above. Upon a review of the whole body of proofs, the verdict in this case is not against the overwhelming weight of the evidence, and we conclude that the trial court did not abuse its discretion in denying defendant's motion for a new trial. *People v Herbert*, 444 Mich 466, 475; 511 NW2d 654 (1993). Although there was conflicting evidence in this case, witness credibility is generally for the trier of fact, here the jury, to resolve. *People v DeLisle*, 202 Mich App 658, 662; 509 NW2d 885 (1993). Although a trial court may grant a new trial after finding the testimony of witnesses not to be credible, such an undertaking should be done with great caution. *Herbert, supra*, p 477. A review of the record does not reveal that the prosecutor's witnesses were so inherently incredible or that the verdict is against the overwhelming weight of the evidence that defendant was entitled to a new trial. Accordingly, the trial court did not abuse its discretion in denying defendant's motion for a new trial.

Next, defendant argues that the trial court erred in denying his request for an evidentiary hearing on his claim of ineffective assistance of counsel. Although it would have been preferable for the trial court to have conducted an evidentiary hearing regarding defendant's ineffective assistance of counsel claim, we deny defendant's request for an evidentiary hearing because, upon a review of the record, we agree with the trial court that defendant was not denied the effective assistance of counsel. See, e.g., *People v Ginther*, 390 Mich 436, 442-444; 212 NW2d 922 (1973).

Defendant first informed the trial court of his dissatisfaction with trial counsel at a pretrial hearing held on September 28, 1994. Defendant told the court that he did not "feel comfortable" with counsel and that he did not believe that counsel was acting in his best interest. Defendant also stated that he had left numerous telephone calls with counsel that were not returned. The trial court directed defendant to go with counsel to the public defender's office and discuss the problem with the chief public defender.

When trial began on October 18, 1994, defendant said nothing to the court regarding his trial counsel. Defendant then moved for a new trial on January 10, 1995, filed an amended motion for new trial on May 26, 1995, and a hearing was held on June 9, 1995. The trial court indicated that it would withhold its ruling on the motion until it could review the transcript of the pretrial proceedings. Defendant then filed a supplemental motion for new trial on September 21, 1995, and the trial court ultimately held a hearing on November 2, 1995. The trial court ruled that defendant had waived his right to complain about the substitution of counsel because the court had heard nothing from defendant after advising him to talk to the chief public defender. The trial court also denied defendant's request to hold an evidentiary hearing regarding his claim of ineffective assistance of counsel.

On appeal, defendant contends that counsel was ineffective for failing to return his telephone calls, for meeting with him for only one-half hour, and for failing to call two witnesses who would have testified to his character. In order to prove a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below and objective standard of reasonableness and that the representation so prejudiced the defendant so as to deprive him of a fair trial. *People v Pickens,* 446 Mich 298, 309; 521 NW2d 797 (1994).

First, even if we accept defendant's assertion that counsel met with him for only one-half hour to discuss the case and that counsel did not return his telephone calls, this does not automatically amount to ineffective assistance of counsel. Defendant has not shown that he was prejudiced by such conduct. The record indicates that counsel effectively cross-examined the witnesses and was able to adduce conflicting evidence. The trial strategy was clearly to attack the intent element, i.e., that defendant did not have the intent to steal the VCR. The fact that the strategy did not work to defendant's benefit does not mean that counsel was ineffective.

With respect to the claim that counsel was ineffective for failing to call the two witnesses, we do not agree. In his affidavit, defendant does not explain why he did not inform counsel of the two witnesses when they met one week before trial, but only stated that one witness would have testified to his honesty and integrity and that the other witness would testify that defendant had helped her select a VCR for purchase. Although defendant's intent was the critical element at trial, we are not convinced that he was prejudiced as a result of the failure to call these two witnesses. Neither witness was actually with defendant at the time of the alleged shoplifting and we are unable to conclude that but for counsel's error in not calling the witnesses, there is a reasonable probability that the result of the trial would have been different. This is not an instance where the witnesses would have produced exculpatory evidence. Cf. *People v Johnson,* 451 Mich 115, 122-124; 545 NW2d 637 (1996).

Accordingly, we conclude that defendant was not denied the effective assistance of counsel and was not denied a fair trial in this regard.

Affirmed.

/s/ Myron H. Wahls
/s/ Harold Hood
/s/ Kathleen Jansen